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Autism Spectrum Disorder and the Criminal Law

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This article contains much of what we discussed in our Libertas Lecture on 22 April 2021 which followed the theme of the A.A. Milne quote:

“You can't stay in your corner of the forest waiting for others to come to you; you have to go to them sometimes”.

In criminal proceedings legal professionals have to consider, recognise and respond to a range of issues that regularly confront medical professionals. These include adverse mental health; equality, and inclusion issues; poverty; evidence of bullying; parental substance misuse (alcohol and/or drug use); domestic (inter-partner) violence; and child abuse. Add to this Autism Spectrum Disorders (ASDs) where the display of challenging behaviour, particularly by children¹ and within the criminal justice system means we have a forest of problems with no apparent clearing. This short article particularly considers accused persons in contact with the criminal justice system who may have some or all of these issues along with other disabilities.

Research has identified seven steps to protecting children and young people: (i) improving education; (ii) increasing employability and employment; (iii) decreasing poverty; (iv) tackling neglect; (v) recognising your role as a community leader; (vi) empowering children and young people and (vii) building child safe communities with happy, healthy and safe children and young people at their hearts.²

¹ In this article a child is considered to be a person who has not yet reached their 18th birthday *as per Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1.

² Andrew G Rowland. ‘Building child safe communities with children and young people at their hearts’ (PhD thesis, The University of Salford, 2020); Andrew G Rowland. *Life on the tracks* (The University of Salford, 2019); Andrew G Rowland et al. ‘From sick kids to SicKids!’ (Project Report,

We consider to what extent the approach to autism is sufficient 'protection' in English criminal justice in three main respects: Procedural adaptations so that a child with an Autism Spectrum Disorder (ASD) can effectively participate in a criminal trial; how autism might impact on criminal responsibility, particularly in cases where a child is accused of being complicit in a crime; and how autism can be considered on sentence, without improper conclusions on dangerousness, particularly where children are undiagnosed until they have the benefit of legal representation.

ASDs are neurodevelopmental disorders characterised by reciprocal social interaction and communication impairments and restricted repetitive behaviours.³ Whilst there is no evidence to indicate that individuals with an ASD are more likely to offend when compared to individuals without an ASD (and may actually be more likely to be victims of a crime rather than the perpetrator), clearly some individuals do engage in behaviours that result in involvement with the criminal justice system.

An increasing number of studies are indicating that certain features or symptomology of ASD can provide a real context for vulnerability to explain engagement in a range of offending behaviours including: arson; the viewing of indecent child images (images of child sexual abuse); violent behaviour; sexual "hands-on" offences; stalking; terroristic behaviours; cybercrime and mass shootings. It is imperative that the role that certain features or symptomology of ASD can have in the offence or offences in question is understood when considering alleged conduct and state of mind and appropriate special measures. It is also particularly critical in terms of diversionary measures, sentencing, and out of court disposal.

As more is understood about ASDs the practical reality is that it can remain misunderstood by criminal justice professionals and/or jurors may hold misconceptions about ASD. This may have a negative impact on the decision making regarding an accused person with ASD. This may be procedural: As highlighted by Dr Ian Freckelton SC in Australia, *'the behaviour of a person with*

The University of Salford and SicKids, 2017) Si; Andrew G Rowland. *'Living on a Railway Line: turning the tide of child abuse and exploitation in the UK and overseas'* (Discussion Paper, The Winston Churchill Memorial Trust and the University of Salford, 2014).

³ 'Autism spectrum disorder', *International Classification of Diseases 11th Revision* (online, May 2021) <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/437815624>.

*ASD at trial can be alienating and highly prejudicial.*⁴ It may also be relevant to the issues in a trial such as what an ASD accused person knows and understands about the actions of others.

Procedural adaptations for defendants with an ASD

There are a variety of behaviours that individuals with ASDs (including individuals with high functioning ASD) can exhibit during court proceedings that may make them appear bizarre and misunderstood that require special measures and judicial direction.⁵ These procedural adaptations for defendants with an ASD are now relatively well progressed: there is detailed guidance in a toolkit from The Advocate's Gateway⁶ and the Autism Society⁷ and substantial guidance in the Equal Treatment Bench Book.⁸ Representing a child with ASD who is accused of a serious crime is likely to be one of those rare cases where an intermediary would be useful and would be funded. It is important to explain to the jury that special measures⁹ are relatively routine and helpful. This also accords with guidance published by the American Bar Association.¹⁰

Criminal responsibility – focus on complicity

Some of the common features of ASD might affect an assessment of criminal responsibility. A person with ASD may appear evasive, remorseless, lacking in empathy or look 'guilty'. They may also have issues with memory and with sequencing of events; lack of outward emotional expression; unusual ways of speaking; inappropriate expressions or behaviours; difficulty with making or

⁴ Ian Freckelton, 'Forensic Issues in Autism Spectrum Disorder: Learning from Court Decisions' in Michael Fitzgerald (ed) *Recent Advances in Autism Spectrum Disorders - Volume II* (InTechOpen, 2013).

⁵ R v T (S) [2015] EWCA Crim 1916

⁶ 'Planning to question someone with an autism spectrum disorder including Asperger syndrome: Toolkit 3' (Toolkit, The Advocate's Gateway, 1 December 2016) <https://www.theadvocatesgateway.org/images/toolkits/3-planning-to-question-someone-with-an-autism-spectrum-disorder-including-asperger-syndrome-2016.pdf>.

⁷ 'Advice and Guidance', *National Autistic Society* (Web Page, 23 February 2021) <https://www.autism.org.uk/advice-and-guidance>.

⁸ Judicial College UK, *Equal Treatment Bench Book* (February 2021) <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>.

⁹ 'Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures' (Guidance Paper, Ministry of Justice, March 2011) https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf; 'Special Measures', *Crown Prosecution Service* (Web Page, 19 April 2021) <https://www.cps.gov.uk/legal-guidance/special-measures>.

¹⁰ Elizabeth Kelley (ed), *Representing People With Autism Spectrum Disorders A Practical Guide for Criminal Defense Lawyers* (American Bar Association, 2020).

maintaining eye contact; literal cognitive style or interpretation of information (cognitive rigidity or inflexibility of thought); issues with compliance; difficulty in recognising simple conventions in conversations (social cues); presence of paranoia; issues with time to respond; echolalia or repetitive vocalisations; repetitive behaviours or interests; and/or particular obsessions.¹¹ These are features of ASDs that may be perceived by criminal justice professionals and jurors as being evidence of guilt or lack of remorse. This can significantly affect outcomes where wrong conclusions may be made about credibility and reliability if the ASD is not explained. In addition, these many features of ASDs may well be relevant to criminal responsibility and an understanding of the functioning of the individual could make a difference in the verdict.

Here we consider children caught up in what is known as “joint enterprise” murder but as a matter of law involves asking a jury to decide if child with ASD was complicit in the crime of another. The approach of the Court of Appeal in the Alex Henry appeal was to reject a diagnosis of autism. The effect ASDs can have in complicity cases more generally was therefore not considered by the Court. The liability of a secondary party is properly described as derivative: it derives from and is dependent upon the liability of the principal. It is necessary to prove that the alleged secondary party *knew* the essential facts and did acts which demonstrate a ‘shared intention’ to commit the crime or an intention to assist or encourage that crime.¹² In some cases, there will be an issue over whether the conduct of the principal offender was an ‘overwhelming supervening act’ which necessitates consideration of what the defendant with an ASD ‘contemplated’. The point here is that ASDs can be relevant to knowledge, intention and contemplation as well as understanding conduct. Diagnosis will require expert evidence but expert evidence can also help on the *ability* to know, intend or contemplate, particularly in fast-moving violent events. This will require

¹¹ See Clare Sarah Allely, ‘Firesetting and arson in individuals with autism spectrum disorder : a systematic PRISMA review’ (2019) 10(4), *Journal of Intellectual Disabilities and Offending Behaviour* 89; Clare Sarah Allely and Larry Dublin, ‘The contributory role of autism symptomology in child pornography offending: why there is an urgent need for empirical research in this area’ (2018) 9(4) *Journal of Intellectual Disabilities and Offending Behaviour* 129; Clare Sarah Allely and Ann Creaby-Attwood, ‘Sexual offending and autism spectrum disorders’ (2016) 7(1) *Journal of Intellectual Disabilities and Offending Behaviour* 35; Colleen M Berryessa, ‘Judiciary views on criminal behaviour and intention of offenders with high-functioning autism’ (2014) 5(2) *Journal of Intellectual Disabilities and Offending Behaviour* 97; Penny Cooper and Clare S Allely, ‘You Can’t Judge a Book by Its Cover: Evolving Professional Responsibilities, Liabilities and Judgecraft When a Party Has Asperger’s Syndrome’ (2017) 68(1) *Northern Ireland Legal Quarterly* 35; Lino Faccini and Clare S Allely, ‘Rare instances of individuals with autism supporting or engaging in terrorism’ (2017) 8(2) *Journal of Intellectual Disabilities and Offending Behaviour* 70.

¹² See ‘Jogee: How Does OSA work’ (Counsel Magazine May 2021) <https://www.counselmagazine.co.uk/articles/jogee-how-osa-works>

obtaining experts' reports and all social, education and health records which may well contain evidence of challenging behaviour, particularly where a child has been undiagnosed. In the generality of cases, psychiatric or psychological evidence is not admissible, save for cases where duress¹³ is raised as a defence, unless the jury require assistance.¹⁴ In most cases the jury will need such assistance and should be told that a child has an ASD. Not to do so would be giving a false impression to the jury of the features unique to the make-up of that person. It may also deprive the jury of relevant evidence to determine the defendant's state of knowledge and decision making at the time of the alleged offence. It could be said that to withhold the information on autism from the jury creates a false impression, particularly if evidence is given. Sadly, the approach to autism is still very ad hoc. This is an area of criminal law where progress has been slow. It behoves prosecutors to accept that an accused person has such disabilities and vulnerabilities. At present, defence counsel have to be particularly fearless to keep matters balanced. Finding ways for background conduct not to be considered to be evidence of bad character but inextricably linked to the disability still seems a long way off. Much may be due to a lack of understanding amongst legal professionals: A 2014 study by Berryessa¹⁵ which investigated judicial views of criminal behaviour and intention of offenders with high-functioning ASD in the United States (US) of America supports the need for and creation of meaningful training programmes on these issues for judges, as well as the criminal justice system as a whole, so that judges are able to more fully understand these issues on their own and meet the needs of these individuals in order to ensure that they have a fair trial.¹⁶ This approach would be welcome in England and Wales. Otherwise, the fear is that Alex Henry's case may create a culture of ignoring autism as a relevant characteristic when considering criminal responsibility.

¹³ 'Defences – Duress and Necessity', *Crown Prosecution Service* (Web Page, 19 October 2018) <https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity>.

¹⁴ *R v Henry* [2005] EWCA Crim 1681; *R v Jackson-Mason* [2014] EWCA Crim 1993; *R v T* [2010] EWCA 2439.

¹⁵ Colleen M Berryessa, 'Judiciary views on criminal behaviour and intention of offenders with high-functioning autism' (2014) 5(2) *Journal of Intellectual Disabilities and Offending Behaviour* 97.

¹⁶ Ian Freckelton, 'Forensic Issues in Autism Spectrum Disorder: Learning from Court Decisions' in Michael Fitzgerald (ed) *Recent Advances in Autism Spectrum Disorders - Volume II* (InTechOpen, 2013).

Sentencing

The Sentencing Council has produced detailed guidance on sentencing offenders with mental disorders, developmental disorders, or neurological impairment.¹⁷ This guidance considers the general approach to sentencing; assessment of culpability; and factors relevant to the determination of the sentence. In addition, a review of the main classes of mental disorders and their presenting features is provided together with guidance on pre-sentence reports and sentencing disposals (including criteria and release provisions).

In addition, in *Khamtokhu and Aksenchik v Russia* 60367/08 the European Court of Human Rights held that:

“The Court considers that when young offenders are held accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation.”¹⁸

In *R (Smith) v Secretary of State* [2006] 1 AC 159 Baroness Hale cited the US Supreme Court in *Roper v Simmons*¹⁹ and stated that:

“...the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. But they also show that an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity.”²⁰

Recognition of these principles in English criminal law still has a long way to go.

¹⁷ ‘Sentencing offenders with mental disorders, developmental disorders, or neurological impairments’, *Sentencing Council UK* (Web Page, 1 October 2020) <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/>.

¹⁸ *Khamtokhu and Aksenchik v Russia* (European Court of Human Rights, First Section, Application Nos 60367/08 and 961/11, 13 May 2014. <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-144794%22%5D%7D>).

¹⁹ *Roper v Simmons*, 543 US 551(2005).

²⁰ *Regina v Secretary of State for the Home Department (Appellant) ex parte Smith (FC) (Respondent) and one other action* [2005] UKHL 51.

We conclude that the “*corner of the forest*” is the criminal justice system. Those people inhabiting that corner (the professionals involved in the criminal justice system), and arguably the system itself, need to move to accommodate what is now known about ASDs and related personal and societal abuses and disadvantages. Courts may not be able to solve all seven steps to protecting children and young people but can engage in improving education. Courts also have a role in the community to change legal approaches to disabled children²¹ (children who are disabled by the society in which they live) where modern scientific knowledge is capable of contextualizing, reducing or removing criminal responsibility. In the meantime, putting defendants with an ASD ‘at the heart of’ a court is still a vexing role for defence lawyers. There is a very real need for meaningful progress on autism starting with training including on how certain features of ASD may provide the context for engaging in different types of offending behaviour. This should be for all legal professionals so we are able to more fully understand ASD issues in context and meet the needs of individuals with ASD accused of a crime in order to ensure that they are fairly tried and outcomes (whether by verdict or sentence) are meaningful and safe.

²¹ *Council for Disabled Children* (Web Page, 1 June 2021) <https://councilfordisabledchildren.org.uk/>.
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